

March 13, 1998

Mr. Gerald Clifford, Acting Regional Administrator
United States Environmental Protection Agency, Region VI
1445 Ross Avenue
Dallas, TX 75202

Re: Texas Natural Resource Conservation Commission's submission seeking approval of its
National Pollutant Discharge Elimination System program

Dear Mr. Clifford:

The Texas Natural Resource Conservation Commission (Commission) has asked me to address in this letter your agency's request for amplification in three areas relating to the Commission's submission seeking approval of its program for regulation of discharges of pollutants into waters.

1. Discussion of Texas Water Code § 5.123 (regulatory flexibility provision enacted in 1997)

In 1997 the Texas Legislature added § 5.123 to the Texas Water Code (Code), authorizing the Commission to exempt an applicant from a requirement of a state statute or rule if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard. This enactment does not subtract from the Commission's authority required as a condition of program approval by the federal Clean Water Act (CWA) and implementing rules. Code § 5.123(a)(2) does not authorize the Commission to grant an exemption that is inconsistent with the requirements for a federally approved program.

2. Discussion of affirmative defense and power to secure injunctive relief

In regard to claims of unauthorized discharges or other violations of Code Chapter 26 or a rule, order, or permit, 30 Texas Administrative Code § 70.7 does not afford an affirmative defense when a strict interpretation in accordance with a plain reading of Code § 7.251 would not afford an identical defense. Thus, any pollution, or any discharge of waste without a permit or in violation of a permit, does not constitute a violation if it is the result of causes outside the control of the person (or his or her agents) otherwise responsible for it and could not be avoided by the exercise of due care, foresight, or proper planning, maintenance, or operation. The Commission by rule may not grant a broader immunity than allowed by statute. Section 70.7 does not insulate third parties such as strikers or rioters from liability if they violate Chapter 26 of the Code. The defense is

available for the action of third parties only to the extent that they come within the language of Code § 7.251. The affirmative defense afforded by Code § 7.251 and 30 Texas Administrative Code § 70.7 will not separately be a condition of a Texas Pollutant Discharge Elimination System (TPDES) permit.

Because § 7.251 does not shield a defendant whose action or inaction contributed to a violation, it would not prevent the imposition of penalties for a violation persisting after the original *force majeure* ceases to be the sole cause, whether the persisting violation was a continuing discharge or a failure to meet other rule, order, or permit requirements.

Among the actions the Commission may take to ensure compliance with the Code, permits, orders, and rules is to “institute legal proceedings to compel compliance with the relevant provisions of [the Code]” Code § 7.002. This authority is equivalent to that required by CWA § 402 (b)(7), 33 U.S.C. § 1342(b)(7). That provision requires that a state have authority to “abate violations of the permit or the permit program,” and has been construed in 40 C.F.R. §123.27 (a)(1) requiring that state authority exist “to restrain immediately and effectively any person . . . from engaging in any unauthorized activity” The Commission by suit in state court may secure an injunction against a violation or threat of violation of a statute, rule or permit. An injunction may be mandatory or prohibitory. Code §7.032.

The main impact of Code § 7.251 is on enforcement actions seeking penalties. It would prevent the imposition of a penalty for a past occurrence proven by the defendant to have been caused solely by an act of God, war, strike, riot or other catastrophe. Although there has been no applicable Texas judicial interpretation of the term “other catastrophe,” the Commission’s interpretation — that it encompasses any unanticipated violent and sudden change in a feature of the earth not preventable by human care or foresight — is consistent with the Code.

The effect of § 7.251 on the Commission’s injunctive authority is minimal. Since injunctions operate prospectively, and since by nature they compel a defendant to do or refrain from doing only things within the defendant’s control, § 7.251 would not prevent a court from enforcing by injunction any Code requirement or prohibition, including the requirement of compliance with all provisions of permits, rules and orders of the Commission. Conduct that may be enjoined if it is at least partly in the control of a defendant includes not only discharges, but also violations and threats of violation of the statutory prohibition against committing any other act or engaging in any other activity “which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state, unless the activity is under the jurisdiction of the Parks and Wildlife Department, the General Land Office, or the Railroad Commission of Texas” Code § 26.121(a)(3)(text of section effective upon delegation of NPDES permit authority). Also subject to injunction would be any causing, suffering, allowing, or permitting of “the discharge of any waste or the performance of any activity in violation of [Code Chapter 26] or of any permit or order of the commission.” *Id.* § 26.121(c). Finally, any causing, suffering, allowing, or permitting of “the discharge from a point source of any waste or of any pollutant, or the performance or failure of any activity other than a discharge, in violation of [Code Chapter 26] or of any rule, regulation, permit, or other order of the commission” would be enjoined. *Id.* § 26.121(e).

3. Discussion of Commission authority to include water-quality based effluent limitations in permits

The Commission is authorized under state law to impose effluent limitations in TPDES permits for all discharges necessary to insure compliance with approved water quality standards.

Sincerely,

Dan Morales
Attorney General

cc: Mr. Larry Starfield, Regional Counsel, EPA Region VI